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NO. 83-1

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THEODORE KOEHLER,

Petitioner,

v

TILDEN N. ENGLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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NOTATION

The following opinions have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the District Court for the Western District of Michigan, dated May 10, 1982 ..... 1a

Opinion of the Court of Appeals for the Sixth Circuit, dated May 9, 1983 ..... 14a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Feb. 7, 1980 — Petitioner Engle's Petition for Writ of Habeas Corpus filed in the United States District Court for the Western District of Michigan.

June 13, 1980 — Respondent Koehler's Answer to Petition and Motion to Dismiss, or in the Alternative, Motion for Summary Judgment filed.

Nov. 24, 1981 — Magistrate's Report and Recommendation filed, recommending that Respondent's Motion for Summary Judgment be granted and the Petition dismissed.

Dec. 7, 1981 — Petitioner's Objections to Magistrate's Report and Recommendation filed.

May 11, 1982 — Opinion and Order of District Court entered, granting Respondent's Motion for Summary Judgment and dismissing the Petition.

June 8, 1982 — Petitioner's Notice of Appeal filed.

June 28, 1982 — Order of the District Court granting Certificate of Probable Cause.

May 9, 1983 — Opinion of the Court of Appeals for the Sixth Circuit.

May 26, 1983 — Court of Appeals Order staying mandate.

JURY INSTRUCTIONS

July 12, 1973

In the Recorder's Court for
The City of Detroit

People v. Tilden Neil Engle	Docket No. 72 09721

CHARGE OF THE COURT TO THE JURY

THE COURT: Ladies and gentlemen of the jury, we have now reached the stage of the case where the jury must assume its responsibility to determine the facts of this case and the questions of guilt or innocence.

As the Judge in the case I instruct you as to the law and it is your duty to follow the instructions of law as I give them to you; not any statements of law that were made by the attorneys in their arguments or in the voir dire or at any other time, but the instructions of law that I give you with regard to the case at the present time.

You should remember that you have the [655] sole responsibility to determine the facts and the questions of guilt or innocence, based on the evidence that you heard from the witness stand in the case and also the exhibits which were received in evidence in this case.

You have a right to take the exhibits with you into the jury room although it is not a good idea to take both the weapon and the bullets at the same time and for that reason I will withhold them. It is your duty to make as true and perfect a finding of facts as you can without any feelings

of prejudice for or against the Prosecution, or for or against the defendant in the case.

Nothing that the attorneys have said in this case is evidence for the simple reason that they were not sworn as witnesses in the case, and you should not assume from anything that the Court may have said or done during the trial of the case that the Court has an opinion one way or another because where there is a jury in the case the jury has the sole and complete responsibility for determining all the questions of fact and guilt or innocence.

Now, this is a criminal case and the [656] defendant is presumed to be innocent until his guilt is established beyond a reasonable doubt. That presumption of innocence begins at the moment he is charged with the commission of the crime and remains with him through all the proceedings, through the trial and through your deliberations in the jury room unless and until there is sufficient competent evidence to remove that presumption and to establish the defendant's guilt beyond a reasonable doubt.

In accordance with that rule of law, no defendant is compelled to produce any testimony in his own behalf because he does not have to prove his innocence; the State must prove him guilty beyond a reasonable doubt.

In this case the defendant took the witness stand and it is your duty to weigh his testimony just as carefully and as fairly as you do the testimony of any other witness in the case, remembering however that he is the defendant and that he has a direct interest in the outcome of the case.

It is also the function of the jury to determine what weight or credibility you will give to the testimony of each witness, taking into consideration the opportunity that the witness

has had to [657] know the facts about which he or she seeks to testify here upon the stand; taking into consideration the demeanor of the witness upon the stand; the reasonableness of the story that is told; whether the story is conflicting with other testimony that the same witness has given or other testimony in the case that you believe to be true, and whether it is corroborated by other testimony that you believe to be true.

These are some of the tests that will occur to you in weighing the testimony in the case.

I now come to the instruction on reasonable doubt and, as I said before, before you can convict the defendant you must be satisfied as to his guilt beyond a reasonable doubt, and that test must be applied to each of the charges that are involved in this case and as to each of the elements of the charges that presented to you for your deliberation.

A reasonable doubt means a fair doubt; a doubt that is based on reason and common sense; not a foolish doubt, not a vain, captious or imaginary doubt; not a doubt which is based — which is conjured up by something outside the testimony. In other words, your doubts in this case should be doubts which relate [658] in some fashion to the testimony in the case. It is such a doubt that after a careful review of all the evidence you cannot say that you have an abiding conviction to a moral certainty of the defendant's guilt. If you have that kind of doubt it is your solemn duty to resolve it in favor of the defendant and to acquit him. If you haven't such a doubt it is, of course, equally your duty to find the defendant guilty.

Now, in this case there has been some evidence offered of statements by the defendant after his arrest and while he was awaiting trial and I charge you in relation thereto

that such statements are to be received with great caution for, besides the danger of misapprehension of the witness or the misuse of words, failure of the party who expressed his own meaning, the infirmity of memory and the danger of the witness relating the statement, placing the wrong construction on, or obtaining an important conclusion, from the word of a defendant, it should be recollected that the mind of the prisoner himself is often oppressed by the calamity of his situation and he is often influenced by motives of fear and [659] hope to make statements.

Now, the information in this case — and the information is the paper which describes the charge against the defendant and is not to be considered as evidence in any way, the information charges that on December 7th, 1972, at 12700 East Jefferson Avenue, in the City of Detroit, the defendant, Tilden Neil Engle, seated at the counsel table, did feloniously, deliberately, wilfully and with malice aforethought, and with premeditation, did kill and murder one Regis Lantzy, contrary to the statute which is Section 750.316, Compiled Laws of 1948.

The first thing you will notice about this charge is that it states that the offense, if one was committed, occurred in the City of Detroit, and that it occurred on December 7th, 1972, and there was evidence in this case that if a crime was committed as charged in the information, it occurred at the Chrysler East Jefferson Plant, on December 7th, 1972, and I instruct you that that address is an address within the City of Detroit. It is necessary for you to make a finding on this fact because this is a Court of limited jurisdiction, limited to trying cases [660] which occurred or occur within the City of Detroit. As I say, there is evidence that the location was within the City of Detroit.

Now, in addition, the information charges that the crime was murder in the first degree; but the information is also broad enough to include two other offenses and I will define not only murder in the first degree but also the two included offenses of murder in the second degree and manslaughter, in this case.

It is the People's theory of the case that on December 7th, 1972, Tilden Neil Engle, shot and killed Regis Lantzy. On that date — you understand that what I am reading now is the People's contention as to what happened on that particular date and immediately afterwards I am going to read the defendant's contention as to what happened and what the case is about. You understand that — and regardless of anything that is said in this paper that defines the People's theory of the case, it is the jury that has the duty of determining what the facts, true facts, are in the case. You understand that?

It is the People's theory of the case [661] that on December 7th, 1972, Tilden Neil Engle, shot and killed Regis Lantzy; on that date, Mr. Engle, who blamed Regis Lantzy for the loss of his job, plotted and conceived a plan by which he would kill Regis Lantzy. He went to the Chrysler Plant on East Jefferson Avenue in Detroit about 9 to 9:30 p.m., knowing that he could enter the plant with the crowd of workers returning from their lunch hour and not be challenged or asked for an employment badge. Once inside the plant, Mr. Engle saw his cousin, Renus Engle, and told him that he was going to kill a guy. Mr. Engle went to Department 9130 and asked specifically for Regis Lantzy. The Clerk, Mr. Ambrose, could not tell Mr. Engle where Mr. Lantzy was; Mr. Engle then stated to the Clerk, "Well, I'll find him." Mr. Engle then approached Regis Lantzy; upon approaching him and having some conversation with Regis Lantzy, he produced a .38 caliber revolver and fired it twice, striking Mr.

Lantzy in the stomach and forearm. Mr. Lantzy turned and ran; Mr. Engle fired again. Mr. Lantzy fell at this point, got up and started to run again. Mr. Engle then extended his arm and took careful aim and fired a fourth time. Mr. Engle [662] walked to Mr. Lantzy's body and, observing him bleeding profusely from the mouth, and Mr. Engle knew he was dead as he had planned. Mr. Engle turned himself in to the office in Department 9130. He was conveyed to the security office by security guard, Samuel Mays. In that office he gave a statement to Patrolman Richard Ren, a statement which exhibits a clearness of mind and very plainly his decision to kill Regis Lantzy, since he stated to Patrolman Ren, that if he had wanted to kill other people he would have because he had more than enough ammunition, but he only wanted to kill Regis Lantzy. The next afternoon at 2:00 p.m., Samuel Nold interviewed Tilden Neil Engle. In this interview, Mr. Engle again related the events of the crime, his plan to kill Regis Lantzy and the manner in which he carried his plan out. All of this theory points to the fact that at the time of the commission of his crime, Tilden Neil Engle knew right from wrong and was not suffering from an irresistible impulse.

Now, that is the People's theory of the case.

I will now read to you the defendant's [663] theory of the case.

From early adolescence, Tilden Engle has been forced to assume the responsibility for the care of his parents. As he reached adulthood he continued this responsibility and assumed a further obligation of a wife and two children. He suffered from a severe mental disease of alcoholism, which was an escape mechanism. Just prior to the incident at Chrysler his ego suffered from five severe shocks; namely, the death of so many people close to him. Further stress factors were a number of suicide attempts in his immediate

family, by his wife and by himself. Regis Lantzy by his action of laying off this man, who had always performed well for him, was the trigger. It was the final threat to his life, family and manhood. His ego reacted in the only manner possible to prevent a total breakdown. He destroyed that which Tilden Engle believed threatened the well being of his family.

Now, those two documents that I have just read are respectively the contentions of the People and the Defendant, with regard to this particular case.

[664] Now, the information in this case, as I have said, charges not only murder in the first degree but also the two included offenses within the charge of murder which are presented to the jury for their determination; specifically, murder in the second degree, and manslaughter.

The statute which describes murder in the first degree is Section 750.316, Compiled Laws of 1948, and reads as follows:

> "All murder which shall be perpetrated by means of poison or lying in wait, or any kind of wilfull, deliberate and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, or burglary." —

I'm sorry, the section has been amended and contains a supplement —

> "— all murder which shall be perpetrated by means of poison or lying in wait, or any other kind of wilfull, deliberate and premeditated killing or which shall be committed in the [665] "perpetration or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree and shall be punished as therein provided."

Now, the next section which is Section 750.317, Compiled Laws of 1948, defines murder in the second degree as follows:

> "All other kinds of murder shall be murder of the second degree."

Now, when — now, I have read you the statute defining murder in the first degree, and it should be noted that there is no charge that the death in this case occurred from poison or in the attempt to perpetrate arson, rape, robbery or any of the specified criminal offenses, but it is the contention of the People that the crime in this case is murder in the first degree because it is the — the murder was wilfull, deliberate and premeditated.

Now, the statute does not contain a specific definition of the crime of murder and we are left to our common law definition of murder and [666] the Court will instruct you with relation thereto:

In similar fashion, Section 750.321, Compiled Laws of 1948, provides a punishment for the crime of manslaughter but, again in that section, there is no definition of what constitutes the crime of manslaughter and the Court will instruct you as to the legal definition of the crime of manslaughter, which is the third offense that must be considered in this case.

A homicide is the intentional taking of a human life. In order to sustain any homicide verdict the Prosecution must prove beyond a reasonable doubt each of the following elements:

> First, that the deceased was a human being who once was living;
>
> Second, that he or she is now dead;

Third, that the defendant caused the death;

Fourth, that the defendant intended to cause the death;

Fifth, that the defendant did not act in self defense; and

Sixth, that the defendant was legally [667] responsible for his acts.

Now, ordinarily, the last question, the question of legal responsibility, does not arise in the homicide case because we have the presumption that a person is of sound mind and, in most cases, the People rely on that presumption and it is not questioned, but, in this case, the defendant alleges that he was not legally responsible for his actions at the time of the alleged offense by reason of temporary insanity and irresistible impulse, or a — or by a degree of intoxication amounting to insanity.

Now when you are considering your verdict in this case if you have a reasonable doubt as to any one of the six elements that I have stated to you just now it would be your duty to return a verdict of not guilty and you would not need to deliberate further in the case. On the other hand, if you find that the Prosecution has proved each of these elements beyond a reasonable doubt, you must then determine whether the killing was first degree murder, second degree murder or manslaughter. To sustain a first degree murder conviction, the Prosecution must establish beyond a reasonable doubt that the killing [668] was done, One, with premeditation and, second, with malice.

To sustain a second degree murder conviction, the Prosecution must prove beyond a reasonable doubt that the killing was done with malice but the element of premeditation is not present in second degree murder.

Manslaughter, on the other hand, is the intentional taking of life without either premeditation or malice.

Murder in the first degree, or in either first degree or second degree, requires a showing of malice but murder in the first degree also requires a showing of premeditation. In other words, whether a murder is first or second hinges on one element: premeditation. To convict the respondent of murder in the first degree it must appear that the killing was wilfull and premeditated. It is not necessary that any definite period of time should have elapsed between the forming of such intention and the striking of the blow which killed the deceased, provided the blow was premeditated and that the defendant acted wilfully.

[669] Now, it is the contention of the People that the defendant's premeditation of the killing was evidenced by the fact that he chose a time to go into the plant when he could get in without a badge by going through with the men who had gone out to lunch and who were returning and, that, further the defendant's premeditation was evidence by the defendant's statement to a relative that he was there to kill a man.

Now, these are elements of the crime of murder in the first degree and before the jury could find premeditation in the case the jury would have to find beyond a reasonable doubt that the defendant went there with premeditation or that he had thought out a plan to kill the deceased in this case and that the killing was intended.

On the other hand, if the killing was done under a sudden impulse without premeditation or a previously formed intention, the offense would be murder in the second degree; if the offense was done with malice the offense would be murder in the second degree, and manslaughter hinges on whether or not there was malice.

If the killing was done with malice [670] it would be one of the degrees of murder, according to whether or not there was premeditation. If there was no malice the crime, at most, would be manslaughter.

Malice is used in a technical sense, including not only anger, hatred and revenge but every other unlawful and unjustifiable motive. It is not confined to particular ill will to the deceased but is intended to denote an action flowing from any wicked and corrupt motive, where the fact has been attended with such circumstances as to carry in them the plain indication of a heart, regardless of social duty and fatally bent upon mischief and, therefore, malice is implied from any deliberate and cruel act against another person, however sudden.

Malice in homicide cases has been defined in another way, as the intentional killing of another person without excuse, justification or provocation, and this brings into the case the question of intent.

We, of course, do not have the power to look into a person's mind to tell what that person is thinking at any particular time, but the law gives us a rule of thumb that a person is [671] presumed to Intend the natural consequences of his acts. It is somewhat like the old saying that actions speak louder than words. Therefore, in determining whether there was an intent to kill, the jury may properly consider that a deadly weapon was used and I instruct you that a pistol is a deadly weapon within the meaning of this instruction.

The jury may properly consider the number and the location of the wounds that were caused to the deceased and you may consider, for instance, that — whether or not the wounds were wounds caused by holding the weapon directly

against the body of the deceased. I think that would be a proper consideration. The jury may consider all of these things in determining whether or not there was an intent to kill in this case; whether there was malice, and, as I say, malice is an element of the crime of murder whether in the first degree or the second degree, which must be proved to your satisfaction and beyond a reasonable doubt.

Now, the other included offense in the case is the crime of manslaughter, and manslaughter is defined as the unlawful killing of another person [672] without malice, expressed or implied.

The offense is one which is committed without malice or premeditation, the result of temporary excitement by which the control of reason is disturbed, rather than from any wickedness of heart or cruelty or recklessness of disposition. The general rule is that if for any person — or for any reason the defendant was at the time of the act disturbed or obscured by passion to an extent which might render ordinary men of fair, average disposition liable to act rashly or without due deliberation or reflection, and from passion rather than from judgment, the crime would be manslaughter.

Now, one of the elements of the crime that the People must prove in this case is that there was freedom from self-defense. Now, in this particular case the evidence does not seem to indicate self-defense and there has not been an argument that there was self-defense in this case but if self-defense is a situation where a person takes the life of another person honestly believing that his own life was in danger, or that he was in imminent danger of receiving serious bodily harm or injury at the hands of the [673] deceased and that he used no more force than was necessary to protect himself under the circumstances.

Now, the defendant in this case has said that he has no remembrance of the alleged crime and that he must have been suffering from temporary insanity which has been described as dissociated reaction, or that he was drinking so much on that day that he has absolutely no recollection of what he did or what occurred on that particular day, so that he did not know what he was doing and cannot be held legally responsible for the shooting of Regis Lantzy, the deceased.

Now, the jury heard the testimony with regard to the use of liquor by the defendant and its effect on the defendant and I will now read you an instruction with regard to the defense of intoxication in a case where the defendant is charged with murder in the first degree:

I instruct you, Members of the Jury, in a case of an offense such as the one charged, committed during a period of intoxication, the law presumes the defendant to have intended the disturbance or obscuration of his faculties which followed his [674] voluntary intoxication. He must be held to have purposely blinded his moral perception and set his will free from control of reason and he should, therefore, be held responsible, as well, for the vicious excesses of the will thus set free as for the acts done by its prompting. In other words, it is well settled law in this state that voluntary drunkenness is not a defense to crime. A man who puts himself in a position to have no control over his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited and when real is so often resorted to as a means of nerving a person up to the commission of some deliberate act, and withal, is so inexcusable in itself, that the law has never recognized it to be an excuse for crime. But, in this connection, I must further instruct you, Members of the Jury, that voluntary intoxication, though being no excuse for the commission of a crime, and

will not relieve a person committing a crime from the penalty of the law, still, in a case of this kind if there is evidence introduced that the defendant was, in fact, intoxicated at the [675] time it is alleged he committed the crime, it should be considered by you for the purpose of determining whether the accused, at the time of the alleged offense, was capable of forming a wilfull, deliberate and premeditated purpose to take life and if in this case, although you believe from the evidence beyond a reasonable doubt that the defendant killed the deceased in manner and form as charged in the information, still, if you further believe from the evidence that at the time he inflicted the fatal injury he was deeply intoxicated, he was so deeply intoxicated as to be incapable of forming in his mind a design deliberately and premeditatedly to do the killing, or if you entertain a reasonable doubt as to these things, then such killing would be, at most, murder in the second degree or manslaughter.

What this instruction is telling you is this: if a man becomes voluntarily drunk, he cannot claim that as a defense to a crime unless he has become intoxicated to such a degree that he cannot form an intent if the crime for which he is charged is a crime which requires an intent, a specific intent, and the crime of murder in the first degree requires [676] the intent to kill — the premeditation — and, therefore, if a person was, in fact, so intoxicated that it was impossible for him to have any intention or any plan to kill somebody, while he might be guilty of murder in the second degree or guilty of manslaughter, he could not be guilty of murder in the first degree for lack of premeditation.

Now, the defendant has also urged the defense of insanity, and, ladies and gentlemen of the jury, it must appear in this case that the defendant is a man of sound mind. By sound mind is not meant a mind which is the equal of any mind — I think I better take — stop and take a drink of water —

(Court pausing)

— by sound mind is not meant a mind which is the equal of any mind possessed by any mortal in the world. We all know there is a difference in the minds of our acquaintances; some men are very bright; others are very dull but they are held accountable. Perhaps it would be enough to say and to leave it right there that if by reason of disease the defendant was not capable of knowing he was doing wrong in the particular act, or if he had not the power to resist [677] the impulse to do the act by reason or disease or insanity, that would be an unsound mind, but it must be an unsoundness which affected the act in question and not one which did not affect it.

Ladies and gentlemen you have heard evidence in this case, you know what the circumstances are and you can judge from all the evidence in the case, including the incident itself and the defendant's conduct at the time, whether or not he exhibited evidence or evidences which leave a reasonable doubt in your mind of the soundness of his mind in that incident. Did he know what he was doing: whether it was right or wrong? And if he did, then did he know or did he have the power, the willpower, to resist the impulse occasioned? You should not draw the inference because a man acts frantically mad and angry—very angry—if he does not resist the impulse, that that is unsoundness of mind. This unsoundness must be the result of a disease and not the result of his having allowed his passions to run until they have become uncontrollable, so the law requires a man that he will curb his passions and restrain himself, and if he does not do so, holds him [678] accountable unless it is by reason of disease which renders him unable to do so.

A defendant is irresponsible if by reason of his disease—and I stress the fact that it must be from disease—he is not

capable of knowing he was doing wrong in the particular act or if he had not the power to resist the impulse to do the act by reason of insanity.

Irresistible impulse is a defense under the above tests but it must be the result of disease and not the result of a defendant having allowed his passions to rise until they become uncontrollable.

Now, in many criminal cases no question of insanity is ever raised because the Prosecution starts out with a presumption that every man is presumed to be sane and responsible for his acts. The presumption of sanity is a legal presumption merely; it lasts only until some evidence is introduced, sufficient to raise the issue. If the evidence raises a reasonable doubt of the defendant's sanity, as I have defined it, you should acquit the defendant by reason of insanity. When evidence of sanity is introduced, creating a reasonable doubt [679] of insanity, the State has the burden of proving sanity beyond a reasonable doubt.

The defendant in this case alleges that at the time of the shooting he was suffering from so-called temporary insanity, rendering him not responsible for the alleged shooting.

What defense attorneys mean by temporary insanity is usually not mental disease at all but merely a strong, emotional agitation, called dissociated reaction which momentarily overwhelms the consciousness in a sane person. A state of dissociation may arise in which the person carries out a series of acts of which he later has little or no recollection. Where this can be proved it would constitute a defense.

Now, ladies and gentlemen of the jury, there were experts brought into testify on both sides. I instruct you that under proper conditions, both experts and lay witnesses, who are not

experts, may express opinions as to the sanity or insanity of the defendant. The jury is the sole judge of the values that are to be given to these opinions. You may accept such offered opinions or you may reject [680] them completely.

At this time I am going to excuse the jury for a short time.

The jury may return to the jury room.

(Jury returned to the jury room at 10:31 a.m.)

(In the absence of the jury.)

THE COURT: I have prepared a set of possible verdicts in this case—I will submit to—I only have one copy—I would also like to know if there are any objections—corrections or additions to the charge that you would like to discuss at this time?

MR. DOETSCH: People are satisfied with the instructions as given, your Honor and we have no objection to the jury being given a copy of the piece of paper entitled, 'possible verdicts.'

THE COURT: Will you examine them, Mr. Robiner?

MR. ROBINER: Your Honor, I think earlier in chambers we—the Court, along with Mr. McGuire, I had raised the qestion of—that it is necessary for the jury to understand that not guilty by reason [681] of insanity does not release the man from any responsibility—

THE COURT: I am going to instruct them as to the possible verdicts and I will do that at the same time.

Anything further?

MR. DOETSCH: I have nothing.

MR. ROBINER: I can't think of anything more.

THE COURT: You may recall the jury.

(Jury recalled and is present at 10:34 a.m.)

THE COURT: Ladies and gentlemen of the jury in this case there are five possible verdicts:

The first verdict is guilty as charged, that is, guilty of murder in the first degree, and that would be—I have explained it—I have made a sheet describing each of the possible verdicts and the requirements for that verdict.

The verdict of guilty of murder in the first degree would indicate that the defendant was sane and killed the deceased with malice and [682] premeditation;

The second possible verdict is guilty of murder in the second degree, that verdict would indicate that the defendant was sane and killed the deceased with malice but without premeditation;

The third possible verdict is guilty of manslaughter; that would indicate that the defendant was sane and killed the deceased without malice and without premeditation;

The fourth possible verdict is not guilty by reason of insanity. That verdict indicates that the defendant did all of the acts charged but was not guilty by reason of insanity;

And the fifth possible verdict is not guilty, a general verdict, that the defendant did not do the acts charged.

Now, I will explain the fourth possible verdict further—the not guilty by reason of insanity verdict; The verdict not guilty by reason of insanity is a special verdict and it means that—it does not mean that the defendant will be discharged. It means that he will be committed to the Department of Mental Health until recovered.

[683] At this time I am going to ask Mr. Robiner to come forward and draw two capsules from the box of capsules to reduce the jury to the constitutional number.

(Whereupon the jury was reduced by 12 jurors by excuse of two jurors selected by capsule by defense counsel.)

(Gladora Coles and Ruth Ann Bates were excused jurors.)

THE COURT: Will you swear the officers to tend the jury?

(Jury Officers sworn by Court Clerk to tend the jury.)

THE COURT: Ladies and Gentlemen of the jury, you will be given a copy of the possible verdicts as soon as we have had them reproduced.

You may retire and consider your verdict.

(Jury excused to begin deliberations at 10:33 a.m.)

IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

No. 57655

EXCERPT FROM DELAYED APPLICATION FOR LEAVE TO APPEAL

PEOPLE
v
TILDEN NEIL ENGLE

• • •

d. Contrary to state and federal law, the judge gave a presumptive, erroneous definition of malice. He said malice includes every bad motive and is implied from every cruel act. Reversible error. *Nye* v *People*, 35 Mich 16, 18 (1862); *People* v *Goodard*, 82 Mich App 424 (1978). He said, "Actions speak louder than words" and "a person is presumed to intend the natural consequences of his acts". Reversible error, even absent defense counsel's objection. *United States* v *Robinson*, 545 F2d 301 (CA 2, 1976); *United States* v *Chiantese*, 546 F2d 135 (CA 5, 1977).

• • •

IN THE SUPREME COURT
FOR THE STATE OF MICHIGAN

No. 57655

EXCERPT FROM BRIEF IN SUPPORT OF DELAYED APPLICATION FOR LEAVE TO APPEAL

PEOPLE
v
TILDEN NEIL ENGLE

• • •

IV. BY INSTRUCTING THAT MALICE INCLUDES EVERY UNLAWFUL AND UNJUSTIFIABLE MOTIVE; THAT MALICE IS IMPLIED FROM ANY DELIBERATE AND CRUEL ACT AGAINST ANOTHER; THAT THE LAW PRESUMES A PERSON TO INTEND THE NATURAL CONSEQUENCES OF HIS ACT; AND THAT "ACTIONS SPEAK LOUDER THAN WORDS", THE JUDGE TOOK THE ISSUE OF MALICE (INTENT) AWAY FROM THE JURY.

This Court has promised to review jury instructions in their entirety. E.g., *People* v *Ely*, 35 Mich App 390, 392 (1971). The whole malice instruction is set out in the Statement of Facts. Three portions *especially* objected to are discussed below.

A. MALICE INCLUDES EVERY BAD MOTIVE AND IS IMPLIED FROM EVERY CRUEL ACT.

The definition of malice as including every bad or unlawful motive, and as implied from every cruel act, is so overbroad

it is meaningless. Under this definition every tortfeasor is a murderer and manslaughter does not exist. This part of the instruction alone was declared reversible error in *Nye* v *People*, 35 Mich 16, 18 (1862):

> "The definition of malice given in this case would remove manslaughter from the catalogue of homicides. *Every crime must be attended with an unlawful and unjustifiable motive.* Malice includes those which are more wicked, but it does not include them all. *There are many unlawful and unjustifiable motives which have never been classed as malicious.*" (Emphasis added).

Recently this Court re-condemned this malice instruction in a case where evidence of malice was strong and defense counsel had not objected. *People* v *Goodard*, ... Mich App .... (#21009, released April 4, 1978).

From whatever ancient source these definitions were dredged up, they are not what malice means in Michigan:

> "Malice aforethought is the intention to kill actual or implied, under circumstances which do not constitute excuse or justification or mitigate the degree of the offense to manslaughter." *People* v *Morrin*, 31 Mich App 301, 310-311 (1971) (footnote omitted).

In *Morrin* Judge (now Justice) Levin warned that jurors would be left to their own confusion by arcane definitions of malice:

> "Consider . . . that the term 'malice aforethought' *does not mean malice as used in ordinary speech*, and forethought is not required, and it becomes clear that *it is well-nigh impossible to communicate to jurors in the arcane jargon of malice aforethought the mental state required.* No

> doubt many jurors are confused, and many, in error but understandably, make up their own working definition of what malice aforethought 'must' mean." At 319-320 (Emphasis added).

The difficult becomes impossible where, as in this case, the instructions are not merely arcane but erroneous. The jurors did not even have to find malice for themselves. The court told them malice is implied from any deliberate and cruel act against another. Since shooting someone is a cruel act, the question was closed. The jury did not have to worry about the intent with which the act was done. Given the act, the law supplied malice.

The law never implies malice. Malice is never more than an inference the jury may, not must, draw. This has been clear in Michigan for over a century. *Maher* v *People*, 10 Mich 212, 217-218 (1862):

> ". . . the question whether [malice] existed or not . . . would seem to be *as clearly a question of fact for the jury, as any other fact in the cause* . . . and that the Court have no right to withdraw the question from the jury by assuming to draw the proper inferences from the whole, or any part of, the facts proved, as presumption of law." (Emphasis added).

See also *People* v *Morrin*, *supra*, and *People* v *Martin*, 392 Mich 553 (1974), affirming *Maher*, and *People* v *Goodard*, supra.

Intent to kill is an essential element of every murder. Permitting the jury to presume intent from an isolated fact (here, a cruel act) conflicts with the presumption of innocence which extends to every element of a crime. *Morrissette* v *United States*, 342 US 246, 275; 72 S Ct 246; 96 L Ed 2d 288 (1952);

Mullaney v *Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975). Defense counsel's failure to object is insignificant. *United States* v *Robinson*, 545 F2d 201, 306 (CA 2, 1976); *People* v *Goodard*, supra. This error cannot be held harmless unless the prosecutor proves beyond a reasonable doubt that the error did not contribute to the verdict. *Id.* But here the error was compounded by two others.

B. "ACTIONS SPEAK LOUDER THAN WORDS".

Several eye witnesses saw Appellant's actions: he shot Regis Lantzy. He never denied it. But many words were spoken in the case about Appellant's state of mind when he acted. These words were Appellant's only defense. The judge effectively told the jury the law considered Appellant's words less important than his actions.

Such a statement has no place in criminal jury instructions, especially in a first-degree murder case where state-of-mind is the vital issue. The judge many (sic) have been merely indulging in a favorite homily. But there is no reason to believe the jury did not accept this as a maxim of law, especially where the rest of the malice instruction was laced with consistent presumptions. See §C.

C. "THE LAW GIVES US A RULE OF THUMB THAT A PERSON IS PRESUMED TO INTEND THE NATURAL CONSEQUENCES OF HIS ACTS."

First-degree murder is a specific intent crime. *People* v *Garcia*, 398 Mich 250 (1976). The prosecutor had the burden of proving specific intent to kill beyond a reasonable doubt. *In Re Winship*, 397 US 358; 25 L Ed 2d 368; 90 S Ct 1068 (1970); *People* v *Jordon*, 51 Mich App 710 (1974); *Mullaney* v *Wilbur*, 421 US 784; 44 L Ed 2d 508; 95 S Ct 1831 (1975). But since the natural consequence of shooting someone at close range is to kill him this instruction relieved the prosecutor of

his duty. The judge said the law *presumed* Appellant intended the natural consequence of his act—Regis Lantzy's death.

A trial court many not instruct that the law raises a presumption of intent from an act. *Morissette* v *United States*, 342 US 246; 96 L Ed 288; 72 S Ct 240 (1952). The rule of *Morissette* was established in Michigan over a century ago:

> "We think the general rule is well settled, to which there are few, if any, exceptions, that when a statute makes an offense to consist of an act combined with a particular intent, then intent is just as necessary to be proved as the act itself, and must be found by the jury, as a matter of fact, before a conviction can be had . . . And in all such cases the *particular intent charged* must be proved to the satisfaction of the jury; *and no intent in law or mere legal presumption, differing from the intent in fact, can be allowed to supply the place of the latter.*" *Roberts* v *People*, 19 Mich 401, 404-415 (1870) (Emphasis added).

Thus, giving the "natural consequences" instruction in connection with a specific intent crime was declared reversible error in *United States* v *Robinson*, 545 F2d 301 (CA 2, 1976). In *Robinson*, the district judge had instructed that:

> "A person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So, unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all the consequences which one in like circumstances and possessing like knowledge should reasonably have expected to result."

The Court on appeal noted that the use of such an instruction, which *allows* the jury to *infer* that a person *ordinarily* intends the "natural and probable consequences" of acts even

knowingly done, has long been condemned in the Second Circuit as shifting the burden of proof on the issue of intent to the defendant.

In the present case the jury was *required* to *presume* that an actor *always* intends the consequences of his acts, even if done in a sub-standard state of consciousness. The present instruction was much more heavy-handed than the one condemned in *Robinson*, and it was only one of a series of instructional errors.

The "natural and probable consequences" instruction in (sic) known as the *Mann* instruction. Recently another federal circuit court became so exasperated with repeated use of the *Mann* instruction despite repeated condemnation and warnings to trial judges that it emphatically declared the instruction per se reversible error, refusing to be sidetracked by considerations of failure to object, curative instructions, or harmless error:

> "This charge has become known as the *Mann* instruction. Probably no other jury instruction has received so much attention and repeated condemnation in this Circuit. Despite our emphatic disapproval in a series of cases, this serpent rears its ugly head once again. This charge is so infamous that in the standard text on federal jury instruction its use is referred to as an 'invitation to reversible error'.
>
> We accept that invitation as the only way for our message to get through." *United States* v *Chiantese*, 546 F2d 135, 136 (CA 5, 1977) (footnotes omitted).*

*After rehearing en banc, *Chiantese* was modified to order:

"1. No district court in this circuit shall include in its charge to the jury an instruction on proof of intent which is couched in language which could reasonably be interpreted as shifting the

burden to the accused to produce proof of innocence. This includes charges such as:

> It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

or

> The presumption is that a person intends the natural consequences of his acts and the natural presumption would be be (sic) if person consciously, knowingly, or intentionally acted, he intends to violate the law.

or

> The law presumes that every man intends the natural and probable consequences of his own knowing acts. Wrongful acts knowingly or intentionally committed can neither be justified or excused on the ground of innocent intent. The intent to injure or defraud can be presumed when the unlawful act which results in loss is proved to have been knowingly committed.

2. The error in giving such a burden-shifting charge will not be absolved because the other phrases defining the proper burden of proof are included in the instructions, no matter how often such corrective phrases are repeated. This court no longer will harmonize inconsistent charges to effect the cure of a charge in violation of paragraph 1.

3. We refuse to classify the giving of a charge in violation of paragraph 1, whether objected to or not, as the type of error which will automatically produce reversal. If, despite our action today, the error should recur, the weighing of its harm to the accused shall remain a judicial matter to be resolved in the context of each case where it occurs. Such weighing, however, shall not include consideration of whether a defective charge has been cured by prior or subsequent statements." *United States* v *Chiantese*, 560 F2d 1244 (CA 5, 1977).

Notice that objection is irrelevant and the only question remaining is that of harmless error.

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In light of *Mullaney* v *Wilbur*, *supra*, where the Supreme Court held that the due process clause requires the prosecution to bear the burden of proof beyond a reasonable doubt on every element of the crime charged, the error inherent in the "natural and probable consequences" charge takes on constitutional dimension. Therefore, held *Robinson*, the defendant's failure to object did not justify a presumption of waiver of his rights under *Mullaney*. Even though the government presented a strong case in *Robinson*, the Court was unable to conclude that the erroneous charge was harmless beyond a reasonable doubt. Robinson's conviction was reversed. Likewise in the present case, defense counsel did not object to the charge. But his failure does not preclude review since the error is of constitutional magnitude, *United States* v *Robinson*, *supra*, and since the error took an essential element of the offense from the jury. *People* v *Murray*, 72 Mich 10, 16 (1888); *People* v *Guillett*, 342 Mich 1 (1955); *People* v *Jordan*, *supra*. Cf. Issue VII

IN THE COURT OF APPEALS
FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee vs TILDEN ENGLE, Defendant-Appellant	No. 78-2485

EXCERPT FROM ANSWER IN OPPOSITION TO DELAYED APPLICATION FOR LEAVE TO APPEAL

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7. Appellee denys that the issue raised by appellant are meritorious. Appellee claims also that the issue raised herein by appellant regarding the correctness of the judges instructions on intoxication was raised by appellant in his original appeal of right and decided by this court in *People* v *Engle*, 61 Mich App 628 (1975). Appellant is foreclosed from raising it again. *People* v *Bergin*, 63 Mich App 526 (1975). Appellee denies that the trial court's instructions were confusing, prejudicial and burden shifting on insanity, intoxication, malice and appellant's credibility.

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IN THE COURT OF APPEALS
FOR THE STATE OF MICHIGAN

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee vs TILDEN ENGLE, Defendant-Appellant	No. 78-2485

EXCERPT FROM BRIEF IN SUPPORT OF ANSWER IN OPPOSITION TO DELAYED APPLICATION FOR LEAVE TO APPEAL

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ARGUMENT

I.

THE DOCTRINE OF "THE LAW OF THE CASE" LIMITS A CRIMINAL APPEAL FROM A SINGLE CONVICTION TO ONE, IN WHICH ALL POINTS WHICH ARE KNOWN (OR COULD BE KNOWN BY THE EXERCISE OF REASONABLE DILIGENCE) MUST BE PRESENTED, PRECLUDING REPETITIVE APPEALS.

After his conviction in 1973 for first degree murder, defendant appealed as of right to this Court. In *People* v *Engle*, 61 Mich App 628 (1973) the Court affirmed defendant's conviction. In that appeal appellant claimed the trial court erred in its instructions on *intoxication*. The court ruled at 630:

> Defense counsel made no objection to that charge and we are persuaded that it was a correct statement of the law before the decision in *People* v *Crittle*, 390 Mich 367 (1973).

Defendant filed an application for leave to appeal in the Supreme Court. Leave to appeal was denied. He now brings this application for leave to appeal to this Court. Appellee contends that leave to appeal to this Court should be denied since the issues raised by appellant are neither jurisdictional, *People* v *Tubbs*, 64 Mich App 341 (1975) (concurring opinion) nor concern a newly decided question of law with retroactivity implications. Appellee contends further that defendant is precluded by "the law of the case doctrine" from raising by this appeal questions that either were or could have been raised in his original appeal of right. That a defendant is not entitled to numerous piecemeal appeals from a single conviction, was stated by this Court in *People* v *Bergin*, 63 Mich App 526 (1975).

> Inasmuch as defendant could have raised these questions, and did, at the time of his original appeal, he is now precluded by the law of the case doctrine from belatedly raising these questions as a subsequent appeal.
>
> Public policy militates strongly against piecemeal litigation of alleged errors by means of successive and interminable appeals from a single judgment. This policy is embodied in a rule of law similar to the res judicata rule, generally known as the law of the case doctrine. 63 Mich App 529.

In addition to the fact that defendant seeks by this application to raise issues that either where (sic) or could have been raised in his original appeal of right, is the fact that at no time did defendant object at trial to the alleged errors which form the basis of his delayed application for leave. He cites five issues based on allegations of instructional error by the trial judge. Defendant did not object to the instructions before the jury retired to deliberate. GCR 1963, 516.2 states:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating specifically the matter to which he objects and the ground of his objection.

Failure to object to instructions precludes appellate review unless it affirmatively appears that the claimed errors resulted in a miscarriage of justice. *People* v *Rhinehart*, 70 Mich App 390, 393 (1976); *People* v *Timothy Washington*, 43 Mich App 150 (1972).

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ORDER OF THE COURT OF APPEALS

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Grand Rapids, on the 25th day of August in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable

Donald E. Holbrook
Presiding Judge
Robert B. Burns
Daniel F. Walsh
Judges

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, -v- TILDEN ENGLE, Defendant-Appellant.	Docket No. 78-2485 L. C. No. 72-09721

In this cause an application for delayed appeal is filed by defendant-appellant, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application be, and the same is hereby DENIED for lack of merit in the grounds presented.

(Certificate omitted in printing)